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FILED
NOV 11 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944 **No. 626**

AMERICAN SCOTTI CORPORATION AND
S. A. SCOTTI & C. OF MONZA, ITALY,
Petitioners,

against

HENRY POLLAK, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, NEW YORK COUNTY

BRIEF FOR HENRY POLLAK, INC., IN OPPOSITION

EDWIN A. FALK,
Counsel for Respondent.

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Statement

By written agreement dated November 7, 1935, the petitioners, an Italian corporation and its wholly owned American subsidiary, sold to the respondent all of their felt hat bodies on hand in the United States that had been imported from Italy by the petitioners. It was further expressly provided by the said written agreement that any customs refunds and any additional duties with respect to the said importations would be for the account of the respondent. (The agreement is printed in full in petitioners' brief, at pp. 29-30.)

On November 22, 1937, as a result of a decision of the United States Court of Customs and Patent Appeals reversing the United States Customs Court, it appeared likely that substantial customs refunds would result from the importations of felt hat bodies by the petitioners. The petitioners' American agent was informed by the respondent of the determination of the Court of Customs and Patent Appeals the day after the decision was rendered (Decision, Finding 31). On that very day he wrote to his principal in Italy as follows: "Whereas this agreement [the agreement of November 7, 1935] was necessary it is now to our complete disadvantage." He added that there was a possibility that the petitioners would receive a portion of any saving that might be made by reducing the 50% retainer which had been made by the petitioners with their customs attorneys here. (Exhibit 10-B.) In response to that letter, the Italian corporation wrote that it was pleased to read "that there is the eventual possibility of recovering something on the payments made to the customs on our importations into the United States from 1930 on. * * * Please act in the best manner and in our interest in order to recover something." (Exhibit 11-B.) This suit was the response to the instruction "to recover something."

The petitioners sued both to "rescind" and to "reform" certain portions of the November 7, 1935 agreement. They sought to rescind only so much of the agreement as provides in its third paragraph that certain customs refunds "are for the account of Henry Pollak, Inc." In the alternative, they sought a reformation of the agreement by striking out the third paragraph thereof which provided that any customs refunds and any additional customs duties with respect to the importation of the petitioners' felt hat bodies would be for the account of the respondent. (Complaint, prayer for relief, pars. 1 and 2.)

The respondent pleaded several affirmative defenses in its answer. The only one that is relevant to this appli-

cation is the second affirmative defense of laches and estoppel. (Answer, pars. 13-17.)

The customs refunds that are the subject of this suit were payable of record either to the respondent directly or to the petitioner American Scotti Corporation. Before the case was reached for trial an order was made in the action appointing a receiver to prosecute the collection of the customs claims made in the name of the petitioners and to hold the proceeds subject to the order of the Supreme Court of the State of New York. Prior to the trial of the action the United States paid to the receiver all the refunds on importations made in the name of petitioner American Scotti Corporation, and the receiver held the net proceeds of the said refunds subject to the order of the Supreme Court of the State of New York. (Decision, Findings 37-40.)

The refunds that were payable of record to the respondent directly were paid to it by the United States prior to the trial of the action. (Decision, Finding 36.)

Summary of Argument

1. No Federal question is involved so as to give this Court jurisdiction to review the judgment of the Supreme Court of the State of New York which gave effect to the petitioners' written assignment to the respondent, of their claims against the United States, although the assignment was not executed in accordance with Section 3477 of the Revised Statutes. (Point I, pp. 4-6.)

2. The judgment of the Supreme Court of the State of New York rests upon two separate non-Federal grounds, each of which is sufficient to sustain the judgment. (Point II, pp. 6-7.)

3. In recognizing the petitioners' written assignment of their claims against the United States, not executed in accordance with Section 3477, the New York State courts followed the applicable decisions of this Court. (Point III, pp. 7-9.)

ARGUMENT

POINT I

No Federal question is involved so as to give this Court jurisdiction to review the judgment of the Supreme Court of the State of New York which gave effect to the petitioners' assignment to the respondent, of their claims against the United States, although the assignment was not executed in accordance with Section 3477 of the Revised Statutes.

By the written agreement of November 7, 1935, the petitioners assigned to the respondent the proceeds of certain customs refunds. The assignment admittedly was not executed in accordance with Section 3477 of the Revised Statutes. The courts of the State of New York gave recognition to the assignment. The petitioners assume jurisdiction in this Court upon the theory that, since the assignment of the petitioners' claims against the United States was not in accordance with the requirements of Section 3477, the petitioners have a "right, privilege or immunity" to be relieved of their bargain.

This Court has specifically held that an issue as to whether or not a state court should enforce an assignment of a claim against the United States not executed in accordance with Section 3477, between the parties, does not present a Federal question, *Conde* v. *York,* 168 U. S. 642. In that case the courts of the State of New York recognized an assignment of a portion of a claim against the United States, although the assignment was not executed in accordance with the requirements of Section 3477. A review of the determination of the New York state courts was sought in this Court. In his opinion dismissing the writ of error, Chief Justice Fuller said:

"In *Walworth* v. *Kneeland*, 56 U. S. 15 How. 348, it was ruled, where a case was decided in a state court against a party who was ordered to convey certain land, and he brought the case up to this court on the ground that the contract for the conveyance of the land was contrary to the laws of the United States, that this was not enough to give jurisdiction to this court under the 25th section of the judiciary act. The state court decided against him on the ground that the opposite party was innocent of all design to contravene the laws of the United States. Mr. Chief Justice Taney, however, said: 'But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the 25th section of the act of 1789 he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights and merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. . . .' "

All that petitioners contend is that the formalities of the written assignment did not conform to the provisions

of Section 3477. But even if they argued, which they do not, that the assignment here was in violation of law, and if they could sustain such an argument, it would avail them nothing, because as Chief Justice Fuller observed: "But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law."

POINT II

The judgment of the Supreme Court of the State of New York rests upon two separate non-Federal grounds, each of which is sufficient to sustain the judgment.

A

The trial court found that the petitioners were barred by laches and were estopped from seeking to modify, reform or rescind the agreement in suit (Decision, Findings 33-35). The petitioners do not challenge these findings in any way.

The defense of estoppel is sufficient to sustain the judgment, even assuming that the petitioners are correct that the New York State courts were in error in their determination of the so-called "Federal question", *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 163-6.

B

In its decision, the trial court also made the following finding:

> "28. The plaintiffs * * * have not sought and do not seek rescission of the agreement in suit in its entirety."

It is well settled by the decisions of the courts of the State of New York that a plaintiff may not rescind a contract in part and affirm it in part. *Merry Realty Co.* v. *Shamokin & Hollis R. E. Co.*, 230 N. Y. 316, 323; *Slater* v. *Slater*, 208 App. Div. 567, 573; *Goins* v. *Atwood*, 204 App. Div. 439, 441; *Hayward* v. *Wemple*, 152 App. Div. 195, 198; *McNaught* v. *Equitable Life Assurance Society*, 136 App. Div. 774, 776-7.

The fact that the plaintiff sought only a partial rescission of the November 7, 1935 agreement was in itself an independent and sufficient reason for the New York State courts to deny the petitioners the relief they sought.

POINT III

In recognizing the petitioners' written assignment of their claims against the United States, not executed in accordance with Section 3477, the New York State courts followed the applicable decisions of this Court.

In his opinion, the trial judge explicitly stated the basis for his recognition of the assignment of the petitioners' claims to the respondent, as follows:

> "Heretofore, plaintiffs moved for judgment on the pleadings and the motion was denied upon the authority of *Martin* v. *National Surety Co.* (300 U. S. 588). The Special Term declared that by reason of the appointment of a receiver with authority to prosecute and collect the claims for refund in suit, and the restraint against the parties to pursue such claims, the assignment was not null and void for all purposes under that statute. On the contrary, the action became one in the nature of an interpleader and the court could adjudicate the equities between the parties without frustrating the purpose of the statute. Upon appeal the determination was affirmed (259 App. Div. 878).

> "Moreover, at the time of the trial the United States Government was absolved of all liability and had voluntarily made full payment to the receiver of all the refund claims in suit as to which any question might have been raised under Section 3477. Thus, this portion of the *res* was actually in *custodia legis* at and before the trial, discharge of any interest of the Government in it, and subject to disposition by this court as the equities may require. For this further reason the plaintiffs' contentions under Section 3477 are without merit."

The trial judge properly enforced the assignment not only because of the decision of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588, but also because it is settled in this Court and elsewhere that, where a court of equity obtains jurisdiction over the *res* that is the subject of the assignment, it will decree and enforce the rights of the parties according to the equities, unhampered by the provisions of Section 3477, and that the United States Government must recognize the authority of a state court receiver appointed to receive the proceeds of a claim against the United States Government. *Price* v. *Forrest*, 173 U. S. 410.

The cases illustrating the said rule are legion. See *McGowan* v. *Parish*, 237 U. S. 285; *Erwin* v. *U. S.*, 97 U. S. 392; *McKnight* v. *U. S.*, 98 U. S. 179; *Bailey* v. *U. S.*, 109 U. S. 432; *Hobbs* v. *McLean*, 117 U. S. 567; *U. S.* v. *Borcherling*, 185 U. S. 223; *Portuguese-American Bank* v. *Welles*, 242 U. S. 7; *Dulaney* v. *Scudder*, 94 Fed. 6 (C. C. A. 5); *Roomberg* v. *United States*, 40 Fed. Supp. 621; *Redfield* v. *U. S.*, 27 Ct. Cls. R. p. 393; *McKay* v. *U. S.*, 27 Ct. Cls. R. p. 422; *People's Trust Company* v. *U. S.*, 38 Ct. Cls. R. p. 359; *Richmond & Danville Railroad Company* v. *Gorman*, 7 App. Cases, D. C. 91; *Oregon Steamship Co.* v. *Otis*, 100 N. Y. 446; *Fortunato* v. *Patten*, 147 N. Y. 277; *Leonard* v. *Whaley*, 91 Hun 304.

In the case at bar the assignment in question does not stand alone but forms part of a larger transaction of which the assignment was one item. What the petitioners are trying to do is to retain all of the benefits that they derived from the transaction but relieve themselves of the assignment. It has been held that an assignor may not retain the benefits of an agreement and also avoid its burdens. *People of State of New York* v. *Hanley Milling Co.*, 41 Fed. Supp. 844, aff'd 123 Fed. (2d) 819.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN A. FALK,
Counsel for Respondent.

HAROLD D. KLIPSTEIN,
Of Counsel.